Supreme Court, U.S.
FILED
JUL 13 1993
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No. 93-76

In The

Supreme Court of the United States

October Term, 1993

GEORGE CHERREY, *et al.*,

Petitioners,

vs.

GERALD DIAZ, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the four year limitations period for an action under the Racketeer Influenced and Corrupt Organizations Act ("RICO") 18 U.S.C. § 1961, *et seq.* begins to run when the plaintiff discovers or should have discovered, both the injury and the defendant's pattern of racketeering, or does it begin to run when the plaintiff discovers or should have discovered, only the injury?

LIST OF PARTIES

Petitioners:

Kathleen Cherrey
George Cherrey

Respondents:

Gerald Diaz
Philip Everson
Alleck Resnick
Resnick, Sopher & Perlow, P.A.
Bay State Title Company
Baltimore Savings and Loan Ass'n, Inc.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

George Cherrey and Kathleen Cherrey ("the Cherreys") hereby respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

Neither the circuit court nor the district court decisions are published.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 16, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 1962. Prohibited activities

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer,

either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1964(c). Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Petitioners Kathleen and George Cherrey ("the Cherreys") purchased four townhouses located in downtown Baltimore, Maryland from respondents Gerald Diaz ("Diaz") and Philip Everson ("Everson"). Diaz and Everson misrepresented the condition and value of the properties and concealed defects in the properties from the Cherreys. This was done by various schemes, including the use of fake tenants and appraisals. Diaz and Everson told the Cherreys that if they were ever dissatisfied with their purchase, they could rescind it and be released from their obligations. Defendants Baltimore Savings and Loan Ass'n, Inc. ("Baltimore Savings"), Bay State Title Company ("Bay State"), Alleck Resnick ("Resnick") and the law firm of Resnick, Sopher & Perlow, P.A. ("Resnick Law Firm") assisted Diaz and Everson in defrauding the Cherreys through the property sale. Closing on the properties occurred on January 30, 1987. In July 1988, the Cherreys informed Diaz that they wished to rescind the sale and be released from their obligations. Diaz refused. It was not until January of 1991 that the Cherreys first learned that the respondents had defrauded other victims in a similar manner.

The Cherreys filed a complaint against the defendants on April 15, 1991, alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(a), (b), (c), (d). Jurisdiction in the district court was based on 18 U.S.C. § 1964(c). In an order dated March 25, 1992, the district court dismissed the complaint on the ground that it was filed more than four years after the Cherreys should have discovered their injury. App. 7a-17a. On April 3, 1992, the district court denied petitioners' motion to amend the judgment. App. 18a-19a.

On May 4, 1992, petitioners filed a notice of appeal. The decision of the district court was affirmed by an April 16, 1993 opinion and judgment of the United States Court of Appeals for the Fourth Circuit. App. 1a-6a.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari in this case for two reasons: (1) because of a clear conflict among the circuit courts; and (2) because the decisions below are in clear conflict with both the intent of Congress and this Court's decision in *Agency Holding Corporation v. Malley-Duff & Associates*, 483 U.S. 143 (1987).

Recovery under RICO requires a plaintiff to prove injury by a pattern of racketeering activity. Four Circuits have ruled that the limitations period for RICO causes of action does not begin to run until the plaintiff has (or should have) discovered both the injury and the pattern. Five Circuits have ruled that the limitations period for RICO causes of action begins to run when the plaintiff has (or should have) discovered the injury, regardless of the discovery of the pattern. This conflict over an important question as to when causes of action begin to accrue should be resolved by this Court.

The Fourth Circuit explicitly acknowledged the conflict in the circuit courts.

> The statute of limitations for a civil RICO action is four years. *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987). The civil RICO plaintiff is permitted to recover damages if he proves that he was injured by the defendant's pattern of racketeering. The two components of this action, injury and pattern, are the basis of a split between the circuit courts of appeal regarding when the statute of limitations in a civil RICO action accrues, or begins to run.
>
> In the Third, Eighth, Tenth, and Eleventh Circuits, the statute of limitations accrues

when the plaintiff discovers, or should have discovered, both his injury and the defendant's pattern of racketeering. *See Glessner v. Kenny*, 952 F.2d 702, 706 (3d Cir. 1991); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin*, 913 F.2d 817, 820 (10th Cir. 1990), *abrogated on other grounds, Lampf, Pleva, Lipkind, Prupis, & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2777 n.1 (1991); and *Bivens Gardens v. Barnett Bank*, 906 F.2d 1546, 1554-55 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1695 (1991). In the First, Second, Seventh, and Ninth Circuits, the statute of limitations accrues when the plaintiff discovers, or should have discovered, only his injury. *See Rodriguez v. Banco Cent.*, 917 F.2d 664, 665-66 (1st Cir. 1990); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464 (7th Cir. 1992); and *Beneficial Std. Life Ins. Co. v. Madariaga*, 851 F.2d 271, 274-75 (9th Cir. 1988).

In *Pocahontas* this circuit adopted the position embraced by the First, Second, Seventh, and Ninth Circuits. "[T]he statutory period begins to run when a plaintiff knows or should know of the injury that underlies his cause of action." *Pocahontas*, 828 F.2d at 220. As a result, a civil RICO action in this circuit is time barred unless filed within four years of the date the plaintiff discovers or should have discovered his injury.

Cherrey v. Diaz, slip op. at 4-5 (4th Cir. 1993) (App. 4a-5a).

With four courts ruling one way and five the opposite way, this clear conflict in the circuits requires resolution by this Court.

When the limitations period begins to accrue in RICO cases is an important issue that should be resolved by this Court. The court below held that it begins to accrue before the petitioners discovered or even should have discovered the existence of a pattern of racketeering activities. However, as the statute makes clear, the existence of a pattern of racketeering activities is a central element of a RICO cause of action; and absent an allegation of same, a RICO action may not be commenced. As this Court noted in *Malley-Duff*, 483 U.S. at 154: "the heart of any RICO complaint is the allegation of a *pattern* of racketeering." (emphasis in original). Allowing the limitations period to begin to run when only injury is known, and not the pattern of racketeering, means that petitioners, and others similarly situated, could be time-barred before they were aware they could commence an action. This obviously "would thwart the legislative purpose of creating an effective remedy." *Malley-Duff*, 483 U.S. at 154.

CONCLUSION

WHEREFORE, the Cherreys respectfully request that this Court grant certiorari in this case to decide this important limitations question and resolve the conflict among the circuits.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED APRIL 16, 1993

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-1524

GEORGE CHERREY; KATHLEEN CHERREY,

Plaintiffs-Appellants,

v.

GERALD DIAZ; PHILIP EVERSON; ALLECK RESNICK; RESNICK, SOPHER, & PERLOW, P.A.; BAY STATE TITLE COMPANY; BALTIMORE SAVINGS & LOAN ASSOCIATION, INCORPORATED,

Defendants-Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Norman P. Ramsey, Senior District Judge.
(CA-91-1361)

Argued: March 2, 1993

Decided: April 16, 1993

Before HALL and LUTTIG, Circuit Judges, and HOWARD, United States District Judge for the Eastern District of North Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

Appendix A

COUNSEL

ARGUED: Philip Bernard Malter, WHEATLEY & RANQUIST, Annapolis, Maryland, for Appellants. Joel Henry Oleinik, ECCLESTON & WOLF, Baltimore, Maryland, for Appellees. ON BRIEF: Peter A. Goldsmith, Allen D. Freemyer, WHEATLEY & RANQUIST, Annapolis, Maryland, for Appellants. Ronald W. Fuchs, ECCLESTON & WOLF, Baltimore, Maryland, for Appellees Alleck Resnick, Resnick, Sopher & Perlow, and Bay State Title; Kathleen M. McDonald, IRWIN, KERR, GREEN, MCDONALD & DEXTER, Baltimore, Maryland, tor Appellee Diaz; Marc Seldin Rosen, Steven S. Chasman, MARC SELDIN ROSEN, P.A., Baltimore, Maryland, for Appellee Baltimore Savings and Loan; Jay Fred Cohen, Baltimore, Maryland, for Appellee Everson.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Plaintiffs-appellants filed a civil complaint against the defendants-appellees under 18 U.S.C. § 1964(c), a subsection of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The district court dismissed the complaint after finding it to be time barred. We affirm the dismissal.[1]

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1. The district court dismissed the complaint after the appellees filed a motion to dismiss for failure to state a claim upon which relief could be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6). However, the court based its dismissal on lack of subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(h)(3), rather than on failure to state a claim.

(Cont'd)

Appendix A

I

Because this case comes before us on appeal of a Rule 12(b)(6) dismissal, we will assume that the facts as stated in the complaint are true. *See Martin Marietta Corp. v. Int'l Telecom. Satellite Org.*, 978 F.2d 140, 142 (4th Cir. 1992) ("In considering a motion to dismiss, the claims must be construed in the light most favorable to the non-moving party and its allegations taken as true."). Appellants are George and Kathleen Cherrey ("the Cherreys"). Appellees include the Baltimore Savings and Loan Association, Incorporated ("Baltimore Savings"), and the Bay State Title Company ("Bay State"). Appellee Alleck Resnick ("Resnick") is an employee of Baltimore Savings and Bay State. Resnick is also a principal in the appellee law firm, Resnick,

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(Cont'd)

We note in passing the general rule that a time barred complaint should be dismissed for failure to state a claim, rather than for lack of subject matter jurisdiction. *See Watts v. Graves*, 720 F.2d 1416, 1423 (5th Cir. 1983) (statute of limitations is a "proper" ground for a Rule 12(b)(6) dismissal); *see also* 5A Charles Wright and Arthur Miller, *Federal Practice and Procedure* § 1360 n.10 (1990) (federal courts permit a statute of limitations defense to be filed under Rule 12(b)(6)).

One exception to this rule is that a time barred complaint filed against the United States should be dismissed for lack of jurisdiction, because compliance with the statute of limitations is a condition of the United States' waiver of sovereign immunity. Failure to comply with all conditions of the waiver of immunity deprives the court of jurisdiction. This exception is illustrated in a decision relied upon by the district court in the present case, *Richmond, Fredericksburg, & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768-69 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 1667 (1992).

Following the general rule, we will treat the dismissal below as one for failure to state a claim under Rule 12(b)(6) rather than for lack of subject matter jurisdiction under Rule 12(h)(3).

Sopher, and Perlow, P.A. Appellee Gerald Diaz ("Diaz") is a real estate broker, and appellee Philip Everson ("Everson") worked with Diaz in the transactions described in the complaint.

After responding to a newspaper advertisement, the Cherreys purchased several housing units from the appellees in downtown Baltimore at a closing which occumd on January 30, 1987. The Cherreys were unable to conduct a thorough inspection of the units because of the presence of tenants, and the Cherreys failed to arrange an independent inspection or appraisal before closing. However, Diaz and Everson promised to allow the Cherreys to return the units if the Cherreys were dissatisfied. The complaint states that after closing, the Cherreys were unable to inspect the units until a tenant moved "after May 1987." However, the complaint also states that at least one of the units was vacant from the date of closing, January 30, until it was rented in March 1987.

Although they paid for major repairs to the units, the Cherreys were unable to rent the properties in October 1987. In July 1988, the Cherreys informed Diaz that they were dissatisfied and wanted to retum the units. Diaz refused to allow the retum.

The Cherreys filed a civil RICO complaint against the appellees on May 15, 1991. The district court granted the appellees' motions to dismiss the complaint after finding it to be time barred. On appeal, we provide *de novo* review. *See Martin Marietta*, 978 F.2d at 142 ("[D]ismissals for failure to state a claim are reviewed *de novo* on appeal.").

II

The statute of limitations tor a civil RICO action is four years. *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d

211, 220 (4th Cir. 1987). The civil RICO plaintiff is permitted to recover damages if he proves that he was injured by the defendant's pattern of racketeering. The two components of this action, injury and pattern, are the basis of a split between the circuit court's of appeal regarding when the statute of limitations in a civil RICO action accrues, or begins to run.

In the Third, Eighth, Tenth, and Eleventh Circuits, the statute of limitations accrues when the plaintiff discovers, or should have discovered, both his injury and the defendant's pattern of racketeering. *See Glessner v. Kenny*, 952 F.2d 702, 706 (3d Cir. 1991); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin*, 913 F.2d 817, 820 (10th Cir. 1990), *abrogated on other* grounds, Lampf, Pleva, Lipkind, Prupis, & Petigrow v. Gilbertson, 111 S. Ct. 2773, 2777 n. 1 (1991); and *Bivens Gardens v. Barnett Bank*, 906 F.2d 1546, 1554-55 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1695 (1991). In the First, Second, Seventh, and Ninth Circuits, the statute of limitations accrues when the plaintiff discovers, or should have discovered, only his injury. *See Rodriguez v. Banco Cent.*, 917 F.2d 664, 665-66 (1st Cir. 1990); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464 (7th Cir. 1992); and *Beneficial Std. Life Ins. Co. v. Madariaga*, 851 F.2d 271, 274-75 (9th Cir. 1988).

In *Pocahontas* this circuit adopted the position embraced by the First, Second, Seventh, and Ninth Circuits. "[T]he statutory period begins to run when a plaintiff knows or should know of the injury that underlies his cause of action." *Pocahontas*, 828 F.2d at 220. As a result, a civil RICO action in this circuit is time barred unless filed within four years of the date the plaintiff discovers or should have discovered his injury.

Appendix A

The Cherreys argue that *Pocahontas* is factually distinguishable from the present case. However, we find their argument unpersuasive. Although the facts of *Pocahontas* may not be identical to the case at bar, we find that we must apply *Pocahontas* because it established a general statute of limitations rule which extends to all civil RICO actions. The facts of particular cases may vary, but the general rule remains the same.[2] As a result, the Cherreys' civil RICO action is time barred unless it was filed within four years of the date they discovered or should have discovered their injuries.

The district court properly applied this analysis in its order dismissing the complaint. The court found that the Cherreys' injury from the appellees' alleged pattern of racketeering was the financial loss the Cherreys suffered at closing by purchasing defective housing units. The court also found that the Cherreys would have discovered their injury by inspecting any of the units after closing, because an inspection would have revealed that the units were in a severe state of disrepair. The court further found that purchasers of real property, such as the Cherreys, had a duty to inspect the property, especially when it was vacant.

Because the Cherreys' complaint indicated that at least one of the units they purchased was vacant from closing on January 30, 1987 until March 1987, the court ruled that the Cherreys should have inspected the unit by March 1987. Because an inspection would have revealed the Cherreys' injury, the court also ruled that the Cherreys should have discovered their injury by March 1987. Applying *Pocahontas*, the district court held that the four-year statute of limitations on the Cherreys' civil RICO action accrued in

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2. Even if we were inclined to disagree with *Pocahontas*, we would not be able to overrule it. *See Brubaker v. City of Richmond*, 943 F.2d 1363,1381-82 (4th Cir. 1991) ("We cannot overrule a prior panel of this circuit.").

March 1987 and expired in March 1991, approximately two months before the Cherreys filed their complaint on May 15, 1991.

We find no error in the district court's reasoning. We agree that the Cherreys suffered a financial injury at closing by purchasing defective housing units. We also agree that they should have discovered their injury by March 1987. Applying *Pocahontas*, the statute of limitations on the Cherreys' civil RICO action expired before the complaint was filed on May 15, 1991. Therefore, we hope that the district court properly granted the appellees motion to dismiss for failure to state a claim upon which relief could be granted.[3]

III

We affirm the district court's dismissal of the appellants' civil RICO complaint for failure to state a claim upon which relief could be granted. Because we affirm the dismissal, we find it unnecessary to reach the appellants' argument that the district court abused its discretion by denying their motion to amend their complaint.

AFFIRMED

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3. The Cherreys urge us to adopt and apply the "rule of separate accrual," a doctrine which creates a separate civil RICO action for each new and independent injury suffered by a plaintiff. *See, e.g., Bankers Trust*, 859 F.2d at 1105 ("civil RICO actions are subject to a rule of separate accrual").

We find it unnecessary to adopt the rule. Even if we applied it in the present case, we would find that the Cherreys suffered no new injuries which were independent of the financial loss incurred at closing. *See Glessner*, 952 F.2d at 707-08 (an injury is not new and independent if it is simply "a recharacterization of [an old] injury" or "the mere continuation of damages into a later period"). As a result, we would affirm the district court's dismissal.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND DATED MARCH 25, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. R-91-1361

GEORGE CHERREY, et al.,

Plaintiffs

v.

GERALD DIAZ, et al.,

Defendants

MEMORANDUM AND ORDER

Pending before the Court in the above-captioned case are several motions filed by plaintiffs George and Kathleen Cherrey and defendants Gerald Diaz, Philip Everson, Baltimore Savings and Loan Association, Inc. ("Baltimore Savings and Loan") and Alleck Resnick, Resnick, Sopher & Perlow, P.A., and Bay State Title Company (the "Resnick defendants"). The Cherreys have moved for leave to amend complaint, and none of the defendants oppose this motion. All of the defendants have filed motions to dismiss. In addition to their opposition to a dismissal, plaintiffs have filed motions to strike the reply briefs of Gerald Diaz and Baltimore Savings and Loan.[1] Finally, all the defendants have

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1. Because the motions to strike are not relevant to the central dispute between these parties and only concern the technicalities of the filing of the defendants' reply briefs, the Court shall deny the motions to strike and focus on the merits of defendants' motions to dismiss.

asked for a stay of discovery.[2] The issues have been briefed by counsel for both sides, and the Court will rule without a hearing pursuant to Local Rule 105.6 (D. Md. 1989). For the reasons set forth below, defendants' motions shall be granted.

I. BACKGROUND

This action arises out of a transaction in which plaintiffs George and Rathleen Cherrey claim that they were fraudulently induced by the defendants to purchase real property in Baltimore, Maryland. Defendant Gerald Diaz, who sold the property to the Cherreys along with Philip Everson, is a licensed real estate broker. Defendant Alleck Resnick, Esq., is a principal in defendant Resnick, Sopher & Perlow, P.A., and is also the treasurer of defendant Baltimore Savings & Loan. The closing was conducted by Alleck Resnick and Resnick, Sopher & Perlow, P.A.

According to the complaint, plaintiffs responded to an advertisement in the Baltimore Sun concerning the sale of three rental properties for investment in November, 1986. George Cherrey spoke to Gerald Diaz and Philip Everson several times and arranged to meet with him and to inspect the properties. Diaz represented that, *inter alia*, all three houses were in good condition, well maintained, continuously rented, and inhabited by stable tenants. In addition, Diaz promised to repurchase the properties and assume the mortgages if the Cherreys had any problems with the houses.

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2. Defendant Gerald Diaz and the Resnick defendants have also filed motions to dismiss in two related cases, *Maas v. Diaz*, Civil Action No. R-91-1360, and *Munafo v. Diaz*, Civil No. R-91-1359. They have requested a stay of discovery in each case pending disposition of the motions to dismiss. In light of the Court's disposition of the present motion, defendant's request is moot as it concerns this action.

Appendix B

Without fully inspecting any of the houses, plaintiffs signed a contract on December 30, 1986 to purchase four properties on South Bruce Street from Mr. Diaz and Mr. Everson for $82,000. Sometime in January, 1987, the Cherreys agreed to add a fifth property located on Pratt Street to the deal for an additional $29,900. The closing occurred on January 30, 1987. Plaintiffs signed a mortgage on their home for $29,000 payable to Gerald Diaz and Philip Everson for the Pratt Street property, and a mortgage for $77,000 payable to defendant Baltimore Savings and Loan for the South Bruce Street properties.

The complaint further states that as the original tenants vacated the properties, the Cherreys began to realize that the condition of the houses, particularly the plumbing and the electrical systems, did not comport with defendants' representations or the local housing code. The first tenant left in May, 1987. The house at 336 South Bruce Street, however, was vacant from the time of closing through March, 1987. Plaintiffs were forced to make extensive and expensive repairs to the houses to put them in habitable condition. Ultimately, plaintiffs instituted this action on May 15, 1991.

The plaintiffs allege that during the course of this transaction, various combinations of the defendants violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*, ("RICO"). They also claim that the defendants' conduct gives rise to liability under various state tort law theories.

II. STANDARD OF REVIEW OF MOTION TO DISMISS

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the bare legal sufficiency of a complaint. In deciding the motion, the Court must take all well-pleaded allegations of the complaint as

true, and must draw all inferences in favor of the plaintiff. *See Coakley & Williams Inc. v. Shatterproof Glass Corp.*, 706 F.2d 456 (4th Cir. 1983), *cert. denied*, 475 U.S. 1121 (1986). After viewing the complaint in this light, the Court may not grant a motion to dismiss unless it appears *to a certainty* that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of [the] claim. *Rogers v. Jefferson-Pilot Life Ins. Co.*, 883 F.2d 324 (4th Cir. 1989) (emphasis added); *see also Conley v. Gibson*, 355 U.S. 41 (1957).

III. ANALYSIS

A. Statute of Limitations for RICO Claims

Defendants Gerald Diaz, Baltimore Savings and Loan, and the Resnick defendants assert in their motions to dismiss that Counts XI - XIV,[3] which allege that several combinations of defendants engaged in illegal racketeering activity, are barred by the four year statute of limitations for RICO claims. In *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987), the Supreme Court held that the four year statute of limitations which applies to cases arising under the Clayton Act also governs RICO actions. The Court did not decide, however, when a cause of action under RICO "accrues" such that the four year statute of limitations will begin to run.

The circuits are currently split over the proper method of determining when a RICO claim accrues. The Fourth Circuit has

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3. Count XI alleges a violation of 18 U.S.C. § 1962(c) by all defendants. Count XII alleges a violation of 18 U.S.C. § 1962(a) by all defendants. Count XIII alleges a violation of 18 U.S.C. S 1962(b) by all defendants. Count XIV alleges a violation of 18 U.S.C. S 1962(d) by all defendants.

taken the approach that the "statutory period begins to run when a plaintiff knows or should know of the injury that underlies his action." *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987).[4] The closing for all the properties occurred on January, 30, 1987, and it was then that plaintiffs suffered the financial loss which constitutes the ultimate injury in this case. This action was filed on May 15, 1991. Plaintiffs contend that they did not receive notice of this injury until May, 1987, when the first of the original tenants vacated one of the properties and they realized the true condition of the house.[5] The complaint, however, contains several factual allegations which seriously undermine this contention. On the face of the complaint, it is clear that plaintiffs should have known several months before May, 1987 that defendants had misrepresented the condition of the properties and inflated the value of the houses.

The complaint states that the property located at 336 South Bruce Street was vacant from the time of closing on January 30, 1987 through March, 1987.[6] As owners, the Cherreys had full access to the vacant property and ample opportunity to enter the

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4. Many other circuits have adopted this accrual rule. *See Rodriquez v. Banco Cent.*, 917 F.2d 664, 666 (lst Cir. 1990); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *State Farm Mutual Automobile Insurance Co. v. Ammann*, 828 F.2d 4, 4-5 (9th Cir. 1987).

5. In the Amended Complaint, the Cherreys' specifically assert that "[b]ecause of Diaz's and Everson's statements that the tenants wanted their privacy . . . the Cherreys did not conduct any further inspections of the properties until the tenants left. The first tenant to leave, at 329 South Bruce Street, left after May, 1987." (para. 27).

6. Amended Complaint, ∏ara. 26.

premises and inspect the house until the first tenant moved in in March, 1987. Even the most cursory examination of the property at any time before or after settlement would have revealed that the defective condition of the house did not comport with defendants' representations. Because it is reasonable to require a purchaser of property to make basic efforts to inspect that property, especially when the property is vacant, the Court finds that the Cherreys should have known as early as January 30, 1987, or at least by March, 1987, that the defendants had misrepresented the condition of the properties and caused them to suffer an injury. Indeed, plaintiffs' failure to inspect 336 South Bruce Street both before and after they acquired an ownership interest in it destroys their claim that they only discovered the defects in the properties after the original tenants vacated the properties.

Apparently realizing that the approach of the Fourth Circuit could extinguish their RICO claims, the Cherreys urge this Court not to apply *Pocahontas*. Instead, plaintiffs argue that the appropriate rule is the competing standard applied by the Eighth Circuit in *Granite Falls Bank v. Henrikson*, 924 F.2d 150 (8th Cir. 1991).[7] In order for a RICO claim to accrue for statute of limitations purposes, the *Granite* court held that the plaintiff must have discovered both the injury and the pattern element of the cause of action. 924 F.2d at 154. Plaintiffs argue that this formulation of the accrual rule applies to the facts of this dispute because *Pocahontas* is limited to cases in which the plaintiff discovered the injury and the pattern element simultaneously. Defendants' interpretation of *Pocahontas*, however, is unduly

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7. *See also Bath v. Bushkin Gaims, Gaines, and Jonas*, 913 F.2d 817, 820-21 (10th Cir. 1990); *Bivens Gardens Office Building, Inc. v. Barnett Bank of Florida, Inc.*, 906 F.2d 1546 (11 Cir. 1990), *cert. denied*, 111 S. Ct. 1695 (1991); *Keystone Insurance Co. v. Houghton*, 863 F.2d 1125, 1134 (3d Cir. 1988).

narrow. Nothing in *Pocahontas* explicitly restricts that opinion to its facts, and defendants have offered no authority to suggest that the *Pocahontas* rule should be so confined. In light of the clear mandate by the Fourth Circuit on this issue and the defendants' failure to distinguish *Pocahontas*, the Court concludes that the Fourth Circuit's accrual rule governs this dispute: Under *Pocahontas*, the Cherreys should have known by March, 1987 that the transaction had harmed them financially. Consequently, all of plaintiffs' RICO claims are barred because they accrued by March, 1987, over four years before the suit was instituted.

Defendant Philip Everson has moved to dismiss both the RICO claims and the pendent state tort claims solely based on plaintiffs' putative failure to state a claim upon which relief can be granted. Although he has failed to seek dismissal on statute of limitations grounds, it is clear that his RICO claims, like those of his codefendants, are time barred. The foregoing discussion demonstrates that all of the RICO claims against all of the defendants can not be maintained because they accrued over four years ago. A court loses its subject matter jurisdiction over an action once it becomes apparent that the claims are barred by the applicable statute of limitations. *See Richmond. F. & P. R. Co. v. U.S.*, 945 F.2d 765, 768 (4th Cir. 1991) *petition for cert. filed*, Jan. 17, 1992 (affirming the dismissal of an action on defendant's motion to dismiss for lack of subject matter jurisdiction because the statute of limitation barred the plaintiff~s claim). Under Fed. R. Civ. P. 12(h)(3), the Court may dismiss an action *sua sponte* whenever it appears that the Court lacks subject matter jurisdiction. Accordingly, the RICO claims against defendant Philip Everson shall be dismissed by order of the court for lack of subject matter jurisdiction.

Appendix B

B. Statute of Limitations for State Law Claims

Gerald Diaz, Baltimore Savings and Loan, and the Resnick defendants also argue in their motions to dismiss that plaintiffs' state law claims of fraud, negligent misrepresentation, legal malpractice, and conspiracy to defraud are barred by the three year statute of limitations in Maryland. Md. Cts. & Jud. Proc. Code Ann. § 5-101. It is not necessary, however, for the Court to reach the merits of this claim. In light of the dismissal of the RICO charges, the Court declines to exercise jurisdiction over the pendent state claims. *United States Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). The Court is of the opinion, however, that for reasons similar to those discussed above, the three year statute of limitations under Maryland law[8] would bar plaintiffs' tort claims.

IV. CONCLUSION AND ORDER

Accordingly, it is this 25th day of March, 1992, by the United States District Court for the District of Maryland,

ORDERED:

1. That the motion to dismiss of defendant Gerald Diaz BE, and hereby IS, GRANTED; and

2. That the motion to dismiss of defendants Alleck Resnick, Resnick, Sopher, & Perlow, P.A., and Bay State Title Company BE, and hereby IS, GRANTED; and

3. That the motion to dismiss of defendant Baltimore Savings

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8. *See* Md. Cts. & Jud. Proc. Code Ann. § 5-101.

and Loan Association, Inc. BE, and hereby IS, GRANTED; and

4. That the motion to dismiss of defendant Philip Everson BE, and hereby IS, GRANTED; and

5. That plaintiffs' motion for leave to amend complaint BE, and hereby IS, DENIED; and

6. That plaintiffs' motion to strike BE, and hereby IS, DENIED; and

7. That the Clerk of the Court shall mail a copy of this Memorandum and Order to all counsel of record.

s/ Norman P. Ramsey
Norman P. Ramsey
Senior U. S. District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. R-91-1361

GEORGE CHERREY, et al.,

Plaintiffs,

v.

GERALD DIAZ, et al.

Defendants.

JUDGMENT ORDER

In accordance with the Memorandum and Order dated March 25, 1992, and filed in the above-captioned case, it is this 25th day of March, 1992, by the United States District Court for the District of Maryland,

ORDERED AND ADJUDGED:

That judgment be, and hereby is, entered in favor of the defendants and against the plaintiffs.

s/ Norman P. Ramsey
Norman P. Ramsey
Senior United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. R-91-1361

GEORGE CHERREY, et al.,

Plaintiffs

v.

GERALD DIAZ, et al.,

Defendants

ORDER

Pending before the Court in the above-captioned case is a motion to alter or amend judgment and a motion for leave to amend complaint, both of which were filed by plaintiffs George and Rathleen Cherrey. Plaintiffs ask the Court to vacate the judgment entered in favor of defendants on March 25, 1992 and to deny defendants' motion to dismiss plaintiffs' complaint. The Court entered final judgment against the Cherreys because the four year statute of limitations for RICO actions barred all of plaintiffs' RICO claims. *See Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143 (1987); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211 (4th Cir. 1987). Plaintiffs' motion to alter or amend judgment has no merit because the Cherreys can not remedy their lack of subject matter jurisdiction. Likewise, their motion to amend complaint must also be denied because none of the proposed amendments cure the underlying problem of the statute of limitations.

Appendix C

Accordingly, it is this 3rd day of April, 1992, by the United States District Court for the District of Maryland,

ORDERED:

1. That plaintiffs' motion to alter or amend judgment BE, and hereby IS, DENIED; and

2. That plaintiffs' motion to amend complaint BE, and hereby IS, DENIED; and

3. That the Clerk of the Court shall mail a copy of this Order to all counsel of record.

s/ Norman P. Ramsey
Norman P. Ramsey
Senior United States District Judge